

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CARRIE COUSER, individually and on behalf of all others similarly situated,

V.

Plaintiff,

COMENITY BANK,

Defendant.

Case No.: 12cv2484-MMA (BGS)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
UNOPPOSED MOTION FOR CY
PRES DISTRIBUTION**

[Doc. No. 96]

On October 12, 2012, Plaintiff Carrie Couser filed this putative class action alleging violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.* See Doc. No. 1. Plaintiff now moves the Court for approval of *cy pres* distribution of remaining settlement funds to certain beneficiaries. See Doc. No. 96. The Court found the matter suitable for determination on the papers and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff’s motion.

BACKGROUND

This action is premised on allegations that Defendant contacted Plaintiff on her cellular telephone in an attempt to collect an alleged debt owed by Plaintiff's mother. Plaintiff alleges that Defendant used an automatic telephone dialing system to place multiple calls to her each day, and that she incurred charges for incoming calls. The Parties ultimately entered into a settlement agreement and on May 27, 2015, the Court granted final approval of the class action settlement ("the Settlement"). *See* Doc. No. 91.

1 For the purposes of settlement, the Court certified the following Settlement Class:

2
3 All persons whose cellular telephone numbers were called by
4 Defendant, released parties, or a third party dialing company on
5 behalf of Defendant or the released parties, using an automatic
6 telephone dialing system and/or an artificial or prerecorded
7 voice, without consent, from August 1, 2010 through May 26,
8 2014, excluding those persons whose cellular telephone
9 number/s were marked with a “wrong number” code in
Defendant’s database (which persons are included in the
putative class in *Picchi v. World Financial Network Bank, et*
al., Case No.:11-CV-61797, currently pending in the Southern
District of Florida).

10 Excluded from the Class is Defendant, its parent companies,
11 affiliates or subsidiaries, or any employees thereof, and any
12 entities in which any of such companies has a controlling
interest; the judge or magistrate judge to whom the Action is
13 assigned; and, any member of those judges’ staffs and
immediate families, as well as persons who validly request
14 exclusion from the Settlement Class.

15 *See Doc. No. 91.*

16 Further, as part of the Settlement, Defendant was required to establish a non-
17 reversionary Settlement Fund in the amount of \$8,475,000.00. After costs and fees were
18 distributed, the Net Settlement Amount was to be distributed *pro rata* to Class Members
19 who had submitted valid and approved claims. Pursuant to the Settlement, the Claims
20 Administrator was to mail Settlement Checks to those Class Members, and any funds not
21 paid out as a result of un-cashed¹ Settlement Checks would be paid as *cy pres* awards to
22 recipients to be agreed upon by the Parties, and upon Court approval. *See Doc. No. 91.*

23 Now, Plaintiff moves for Court approval of *cy pres* distribution of the remaining
24 balance of the Settlement Fund, which amounts to approximately \$871,549.69.² *See Doc.*
25 *No. 96.* Specifically, Plaintiff requests that the balance be divided equally and distributed

27
28 ¹ Claimants were required to cash Settlement Checks within 180 days.

² This amount was calculated as of March 8, 2017, and includes earned interest. *See Doc. No. 96.*

1 to: (1) New Media Rights; (2) Consumer Federation of California; (3) Public Justice
2 Foundation; and (4) Bet Tzedek Legal Services. Defendant Comenity Bank does not
3 oppose this motion.³

4 **LEGAL STANDARD**

5 “[T]he ‘*cy pres* doctrine allows a court to distribute unclaimed or non-distributable
6 portions of a class action settlement fund to the ‘next best’ class of beneficiaries.”” See
7 *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Nachshin v. AOL,*
8 *LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)). “[A] district court should not approve a *cy*
9 *pres* distribution unless it bears a substantial nexus to the interests of the class members,”
10 meaning that the distribution “must account for the nature of the plaintiffs’ lawsuit, the
11 objectives of the underlying statutes, and the interests of the silent class members.” *Id.*
12 (citing *Nachshin*, 663 F.3d at 1036); *see also Six (6) Mexican Workers v. Arizona Citrus*
13 *Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (setting aside district court’s *cy pres*
14 application where distribution to the chosen recipient organization would have
15 “benefit[ed] a group far too remote from the plaintiff class”).

16 **DISCUSSION**

17 Here, “[t]he purpose of the TCPA is to ‘protect the privacy interests of residential
18 telephone subscribers by placing restrictions on unsolicited, automated telephone calls to
19 the home and to facilitate interstate commerce by restricting certain uses of facsimile
20 machines and automatic dialers.’” *Aboudi v. T-Mobile USA, Inc.*, No. 12CV2169 BTM
21 NLS, 2015 WL 4923602, at *5 (S.D. Cal. Aug. 18, 2015) (quoting *Satterfield v. Simon &*
22 *Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009)). In enacting the TCPA, Congress
23 sought to protect people from unsolicited, automated phone calls because they cause a
24 nuisance and constitute invasions of privacy. *See Cabiness v. Educ. Fin. Sols., LLC*, No.
25 16-CV-01109-JST, 2016 WL 5791411, at *6 (N.D. Cal. Sept. 1, 2016); *Satterfield v.*

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27

28³ In fact, Plaintiff’s counsel declares under penalty of perjury that Defendant agreed to the four proffered beneficiaries. *See Doc. No. 96-2, Decl. of Abbas Kazerounian.*

1 *Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).

2 Keeping in mind the foregoing, the Court discusses each of the proffered *cy pres*
3 beneficiaries and their nexus to class interests and TCPA claims in turn below.

4 1. *New Media Rights*

5 New Media Rights (“NMR”) is a program of California Western School of Law
6 committed to “consumer privacy work.” *See Decl. of Art Neill*, Doc. No. 96-3. *Cy pres*
7 funds, if approved, would “support pro bono preventative privacy related legal services
8 for consumers, nonprofits, technology entrepreneurs, and creators across the United
9 States.” *See Decl. of Art Neill*. The program “provide[s] direct legal education and
10 services to consumers,” including “assisting internet users in understanding their rights
11 regarding unwanted text messages, emails, and phone calls under the TCPA and related
12 privacy laws.” *See Decl. of Art Neill*. NMR also advises “technology startups,
13 nonprofits, creators and other small enterprises on how to comply with privacy laws in a
14 consumer friendly way.” *See Decl. of Art Neill*. NMR also provides this type of
15 information on its “heavily trafficked” website. In the past, NMR has “drafted
16 recommendations regarding the TCPA and other consumer privacy concerns” to as a
17 member of the Federal Communications Committee’s Consumer Advisory Committee.
18 Art Neill, the executive director and founder of NMR, provides specific examples of
19 recommendations the program has made to the FCC, which directly address the TCPA.
20 *See Decl. of Art Neill*.

21 Based on NMR’s previous and current commitment to issues of consumer privacy
22 rights and in particular, the statutory scheme at issue in this action, distribution to NMR
23 would “account for the nature of [Plaintiff’s] lawsuit, the objectives of the underlying
24 statutes, and the interests of the silent class members.” *See Lane*, 696 F.3d at 819.
25 Further, despite that the program is headquartered in San Diego, the program clearly has
26 nationwide impact. *Cf. Nachshin*, 663 F.3d 1034, 1040 (disapproving of *cy pres*
27 distribution in part because the settlement class was nationwide yet “two-thirds of the
28 donations [would] be made to local charities in Los Angeles”). Accordingly, distribution

1 to NMR is appropriate.

2 2. *Consumer Federation of California*

3 According to the executive director of CFC, Richard Holober, the Consumer
4 Federation of California (“CFC”) is “a non-profit consumer advocacy organization”
5 which “work[s] to improve state and federal consumer protection laws.” *See* Decl. of
6 Richard Holober, Doc. No. 96-4. The organization has advocated for enactment of a
7 financial privacy law, and legislation protecting against identify theft. CFC has also
8 advocated for the protection of cellular phone users’ Customer Proprietary Network
9 Information, and “led the fight that stopped a 2015 attack on California’s two party
10 consent law for recording or monitoring cellular phone conversation.” *See* Decl. of
11 Richard Holober. Further, CFC has testified in regulatory proceedings in support of
12 “restricting insurer access to a motorist’s confidential automobile’s transponder data,”
13 and sponsored a law preventing “rent to own companies from secretly placing spyware
14 on rental computers.” *See* Decl. of Richard Holober. CFC has also had a hand in
15 enacting legislation regarding the privacy of information concerning the online activities
16 of public school students, limitations on the usage of toll collection data, limitations on
17 the usage of sensitive passenger information by transportation companies, and legislation
18 regarding California’s Confidentiality of Medical Information Act.

19 While CFC may advocate for worthy causes, the Court is bound by Ninth Circuit
20 precedent requiring that those causes be aligned with class members’ interests and the
21 litigation’s underlying claims. The TCPA guards against the nuisance and costs of
22 unwanted telephone calls—regardless of the purpose of the call, or any information
23 potentially gathered during that call. CFC’s focus appears to be primarily on privacy of
24 information and how certain information is used, rather than on the privacy of individuals
25 from unwelcome contact.⁴ Further, Mr. Holober does not state for what purpose the *cy*

27 28 ⁴ The Court is also unpersuaded that the sole fact that CFC has previously “joined in a letter to the FCC . . . seeking to maintain the strong protections of the TCPA” sufficiently establishes the requisite nexus.

1 *pres* funds would be used. Accordingly, based on the declaration provided, the Court
2 cannot be reasonably certain that distribution to CFC would “(1) address the underlying
3 statute[], (2) target the plaintiff class, or (3) provide reasonable certainty that any member
4 will be benefited.” *See Nachshin*, 663 F.3d at 1040. The Court declines to approve *cy
5 pres* distribution to CFC.

6 3. *Public Justice Foundation*

7 “Public Justice PC pursues high impact lawsuits to combat social and economic
8 injustice, protect the Earth’s sustainability, and challenge predatory corporate conduct
9 and government abuses.” *See Decl. of F. Paul Bland, Doc. No. 96-5, ¶ 3.* The Public
10 Justice Foundation, a non-profit “charitable membership organization,” “supports Public
11 Justice PC’s cutting-edge litigation and educates the public about critical public interest
12 issues.” *See Decl. of F. Paul Bland, ¶ 4.* Both organizations have their headquarters in
13 Washington, D.C. Public Justice has litigated “issues that are central to the enforcement
14 of the [TCPA],” such as whether “an unaccepted offer of judgment to the named class
15 representative [rendered moot] a class action.” *See Decl. of F. Paul Bland, ¶ 6.* Also,
16 Public Justice “filed an amicus brief in *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 U.S.
17 LEXIS 3046 (May 16, 2016),” regarding “Article III challenges to standing in privacy
18 injury cases.” *See Decl. of F. Paul Bland, ¶ 6.* Further, Public Justice “provides
19 assistance and information on a pro bono basis to individuals and attorneys who represent
20 individuals and classes who have been harassed by violators of the TCPA,” and holds
21 educational events regarding “issues involving challenges to abuses of mandatory
22 arbitration clauses (a major defense in many privacy injury cases).” *See Decl. of F. Paul
23 Bland, ¶ 7.* The executive director of both organizations, F. Paul Bland, declares under
24 penalty of perjury that *cy pres* funds will be used “to further [the organizations’]
25 consumer protection advocacy and education efforts nationwide.” *See Decl. of F. Paul
26 Bland, ¶ 9.*

27 Distribution to the Public Justice Foundation bears a sufficiently “substantial nexus
28 to the interests of the class members,” particularly based on the organizations’ focus on

1 issues related to enforcement of the TCPA, such as current Article III standing issues, and
2 assistance to those whose rights under the TCPA may have been violated. *See Lane*, 696
3 F.3d at 819. Accordingly, the Public Justice Foundation is sufficiently “tethered to the
4 nature of the lawsuit and the interests of the silent class members,” such as their interest
5 in redressing violations of the TCPA in federal courts. *See Nachshin*, 663 F.3d at 1039.
6 Further, Public Justice’s work benefits consumers nationwide. Thus, the Court approves
7 distribution of *cy pres* funds to the Public Justice Foundation.

8 4. *Bet Tzedek Legal Services*

9 Lastly, Plaintiff requests the Court approve *cy pres* distribution to Bet Tzedek
10 Legal Services in Los Angeles. Bet Tzedek “is a non-profit legal services program that
11 provides free legal services primarily to low-income residents of Southern California.”
12 *See Doc. No. 96-6, Decl. of Gus T. May, ¶ 4.* Gus T. May, the legal director at Bet
13 Tzedek, states that the organization represents clients “in numerous legal areas,” such as
14 elder law, (specifically, elder financial abuse), real estate fraud, consumer fraud, debtor’s
15 rights, debt counseling, housing and government benefits, employment law, (specifically,
16 wage theft), human trafficking, and “tax problems resulting from fraud against our
17 clients.” *See Decl. of Gus T. May, ¶ 7.*

18 Based on this information, the Court declines to approve *cy pres* distribution to Bet
19 Tzedek. Again, while the organization may support noble causes, *cy pres* beneficiaries
20 must have more than a tenuous connection to the Class and litigation. *See Lane*, 969 F.3d
21 at 821 (stating that in *Nachshin and Six (6) Mexican Workers*, “the connection between
22 the *cy pres* recipients and the absent class members” was “too tenuous”). Here, based on
23 Mr. May’s declaration, Bet Tzedek’s work appears to be insufficiently related to the
24 absent Class Members’ interests and the purpose of the TCPA. The organization
25 provides legal services in a wide variety of areas, the majority of which are unrelated to
26 the invasion of privacy interests contemplated by the TCPA. Also, Bet Tzedek
27 admittedly predominately serves residents of Los Angeles, further diminishing the
28 likelihood that any Class Member in the nationwide Class would indirectly benefit from

the *cy pres* distribution. *See Six (6) Mexican Workers*, 904 F.2d at 1308 (stating that *cy pres* “distribution of unclaimed funds” is meant to “indirectly benefit the entire class”); *see Nachshin*, 663 F.3d at 1040 (“The *cy pres* distribution also fails to target the plaintiff class, because it does not account for the broad geographic distribution of the class.”). Lastly, Mr. May does not describe for what specific purpose the funds would be used for. *See Decl. of Gus T. May, ¶ 9* (stating only that the funds, if approved, “will directly support these vital legal services”). Unfortunately, for the reasons stated above, the Court declines to approve *cy pres* distribution to Bet Tzedek.

CONCLUSION

In sum, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's motion for approval of *cy pres* distribution as set forth above, and further **ORDERS** that:

1. New Media Rights and Public Justice Foundation are designated the *cy pres* beneficiaries of the remaining balance of the settlement fund and must share equally in the *cy pres* award; and
2. Kurtzman Carson Consultants, LLC, the claims administrator, must promptly distribute the *cy pres* award to New Media Rights and Public Justice Foundation in equal amounts.

IT IS SO ORDERED.

Dated: May 26, 2017

Michael M. - Ruello

Hon. Michael M. Anello
United States District Judge